U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 02 September 2003

CASE NO.: 2002-LHC-2863

OWCP NO.: 07-163828

IN THE MATTER OF:

GLEN A. CAMPBELL,

Claimant

v.

J & M ASSOCIATES, INC.,

Employer

LIBERTY MUTUAL FIRE INSURANCE CO.,

Carrier

APPEARANCES:

SUE ESTHER DULIN, ESQ.

For The Claimant

BENJAMIN U. BOWDEN, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Glen A. Campbell (Claimant) against J & M Associates, Inc. (Employer) and Liberty Mutual Fire Insurance Co.(Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 19, 2003, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 23 exhibits and Employer/Carrier proffered 18 exhibits which were admitted into evidence.[1] This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on August 8, 2003. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. That Employer/Carrier filed a Notice of Controversion on April 30, 2002. (Tr. 18).

2. That an informal conference before the District Director was held on June 26, 2002. (Tr. 17).

3. That Claimant's average weekly wage at the time of the injury was $583.50. (Tr. 18).

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[1] Claimant offered CX-19, an affidavit of Bobby Ladnier, to which Employer/Carrier objected since no opportunity for cross-examination had been presented. Employer/Carrier offered EX-18, an affidavit of Juan Gonzales, to which Claimant objected as self-serving and because of a lack of opportunity to cross-examine affiant. Both parties were given 14 days to conduct post-hearing depositions of the opposing affiants, however, neither provided any additional evidence. Both affidavits are hearsay statements made out of court by declarants whose trustworthiness cannot be assessed. Therefore, although CX-19 and EX-18 were received into evidence, their evidentiary value is reduced and will be accorded less probative weight.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer/Carrier Exhibits: EX-___.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation.

2. Fact of accident/injury.

3. Date the employer was notified of accident/injury.

4. The nature and extent of Claimant's disability.

5. Whether there existed an employee-employer relationship at the time of the accident/injury.

6. Whether Claimant has reached maximum medical improvement.

7. Claimant's entitlement to and authorization for medical care and services pursuant to Section 7 of the Act.

8. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Hearing Testimony

Claimant

At the time of the hearing, Claimant was 48 years old and residing in Gautier, Mississippi with his ex-wife, Vicky Campbell. Claimant and his ex-wife have three children namely, Diana Dunham, age 24, Glen D. Campbell, age 20, and Keegan I. Campbell, age 4. Claimant's ex-wife and two of their children, Glenn and Keegan, are dependent upon Claimant. (Tr. 35-37).

In deposition, Claimant stated he was expelled from school in the seventh grade for fighting and never returned. (EX-2, p. 4). Claimant admits he can neither read nor write well.[3] Claimant testified he has never attempted to obtain his GED because of this. (Tr. 37-38).

[3] Mr. Thomas H. Christiansen, a licensed professional counselor, conducted an "initial vocational evaluation" on Claimant. The results of Claimant's achievement test (tan version)indicated Claimant reads at a 2nd grade level and comprehends mathematics at a 5th grade level. (CX-22, pp. 1-7).

Claimant stated, after leaving school, he was first employed by Phillip Oil Company where he worked as a gas station attendant. Next, he worked at Holston's Battery where he rebuilt batteries, starters, alternators, and worked on radiators. Later, Claimant worked on an assembly line in door factory. (Tr. 38-39).

Claimant's first "real job" was with AWI working offshore as a floor hand. Claimant stated this was heavy work which required a lot of lifting. Claimant was next employed by Borden's Milk. Claimant testified his duties with Borden also required heavy lifting. Next, Claimant was employed by Mr. Randall Doggett where he worked as a frame-carpenter for approximately 10 years. Upon leaving Mr. Doggett's employment, Claimant secured work with Mr. Billy Ray where he was again employed as a frame-carpenter. Claimant states he was employed with Mr. Ray off and on for about 5 years until he decided to become self-employed doing carpentry remodeling work. (Tr. 39-41).

Claimant began working in the marine repair industry with Landry Boat Works. Claimant testified his duties included replacing keel boards, sandblasting and painting. Claimant approximates he worked for Landry for 5 years. Claimant was next employed by Ingalls Shipbuilding where he worked as a joiner. Claimant classified this work as heavy and stated he was paid $13.00 to $14.00 an hour. Claimant worked with Ingalls for approximately 2 years until he was laid off. (Tr. 41-42).

Thereafter, Claimant began working for manpower companies. The first of which was Eagle Manpower. Claimant was employed by Eagle as a ship-fitter and was paid $19.00 an hour. While employed by Eagle Manpower, Claimant worked in shipyards in Florida and Mississippi. Claimant states he worked for Eagle Manpower for approximately 1 year and 4 months. Claimant was again employed as a ship-fitter earning $19.00 an hour with IMI, which sent Claimant to shipyards in Florida and Alabama. Claimant estimates he worked with IMI for 2 months. Claimant next worked for Seaport Services. Seaport Services sent Claimant to Norfolk, Virginia where he worked as a ship-fitter at Metro Machine making $21.00 an hour. Claimant states while at Metro Machine he was asked to "rolled over" and began working for Metro Machine directly. Claimant states Metro Machine paid him $15.88 an hour plus $750.00 a week per diem. Claimant next worked for Ameri-Force as a ship-fitter making $21.00 an hour. Ameri-Force worked Claimant in a Mississippi shipyard. (Tr. 39-47).

Claimant testified prior to his March 4, 2002 work injury he had only been injured at work on two other occasions. Claimant's first injury (elbow trauma) occurred while working at Landry Boat Works and his second injury (wrist trauma) occurred while employed with Ingalls Shipyard. Claimant stated he did not file an accident report on either injury, but just dealt with it and eventually recovered. (Tr. 47-48).

Claimant began working for Employer as a ship-fitter on September 9, 2001. Employer sent Claimant to National Steel and Shipbuilding Corp., "NASSCO", which is located in San Diego, California on the Pacific Ocean. Employer paid Claimant $22.00 an hour and provided him with a hotel room, trolley pass, and one meal per day. (Tr. 49-50).

Claimant testified his duties at NASSCO required him to work overhead, approximately fifty percent of the time, crawl, climb ladders and stairs, and lift heavy equipment. For example, Claimant stated he regularly lifted angle iron, booby-jacks which range from 50 to 85 pounds, steam-bolts, and strong backs. (Tr. 51-54). Claimant described a strong back as a piece of steel about 3/8" thick, 7 1/4" wide, and 5' long. Claimant estimated the weight of a strong back ranged somewhere between 10 to 100 lbs. (Tr. 52-59).

Claimant testified on the morning of March 4, 2002 his supervisor, Mr. Steve Carr [4], directed him to "fit off" the bulkhead on the Tote. Claimant was working alone on the third deck about mid-ship when the accident occurred. Claimant needed a strong back to clip off the bulkhead so he bent down to pick one up and threw it across his right shoulder then made a turn to go back to the bulkhead; however, upon doing so Claimant states it was as if his shoulder caught fire. Claimant threw the strong back to the ground. Claimant experienced pain in his shoulders, arms, and chest. In addition, Claimant stated because he felt weak he stood around until he was well enough to go to his supervisor's office. (Tr. 57-59).

Mr. Carr was not in his office when Claimant arrived. Claimant informed a man who was there what was going on. The man called Mr. Carr on a radio. Mr. Carr arrived about thirty-five minutes later. Claimant told Mr. Carr he was hurting "real bad" in his neck, shoulders, arms and across his chest. (Tr. 59-60). On cross-examination, Claimant admitted he never told Mr. Carr how he injured himself because Mr. Carr did not ask. (Tr. 90-91). In deposition, Claimant testified the reason he did not tell Mr. Carr about his injury was because he was "hurting too bad to even think about anything like that". (EX-2, p. 14).

Mr. Carr called NASSCO's ambulance which took Claimant to NASSCO's medical facility. Upon arriving at the medical facility, Claimant was met by Mr. Bobby Ladnier, Employer's on-site coordinator. Claimant states the company doctor was concerned about the pain he was having in my neck, arms, and chest and felt he was having a heart attack. Claimant told the company doctor he did not think he was having a heart attack because he had a "piece of steel" on his shoulder when his pain started. The company doctor told Mr. Ladnier that Claimant needed to get to a hospital because he was having a heart attack. Claimant testified it was at this point he became scared because the company doctor made him think he was having a heart attack. (Tr. 61-63; EX-2, p. 14).

Mr. Ladnier drove Claimant to Paradise Valley Hospital were he was seen by an emergency room physician. Claimant states he told the emergency room physician he had thrown a piece of steel on his shoulder, but this did not concern the emergency room physician because he had just left the company doctor who said he was having a heart attack. (Tr. 63-64, 91-92). Consequently, the

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[4] Claimant testified his original supervisor at NASSCO was Mr. Juan Gonzalez; however, approximately a month and a half before March 4, 2002, he was transferred to the Tote, a new vessel NASSCO was constructing, where his foreman changed to Mr. Steve Carr. (Tr. 55-57).

emergency room physician treated Claimant for a heart attack. Claimant was released from the hospital within thirty or forty minutes. (Tr. 64).

After being released from the hospital, Claimant returned to NASSCO's company doctor to try to return to work. The company doctor told Claimant he needed a release from his family doctor to return to work; however, he also referred Claimant to Dr. William E. Monk, M.D., a family practice physician. (Tr. 64-65; CX-21, pp. 7-8). Claimant states he did not want to be hurt and went to Dr. Monk mainly for his blood pressure and because he wanted a release to return to work. In any event, Dr. Monk did not return Claimant to work and instead recommended Claimant consult with his own physician and undergo a nerve conduction test.[5] (Tr. 64-66, 92).

Claimant returned to Mississippi on March 10, 2002 and visited his family doctor, Dr. Robert L. Donald, III, M.D., the next day. (Tr. 66; CX-11, pp. 5-6). Claimant testified he told Dr. Donald he was having problems with his blood pressure and was hurting in his neck, shoulder, arm, chest, and leg. Claimant informed Dr. Donald in his opinion the reason his shoulder was hurting was because he had thrown a piece of steel on it. Dr. Donald recommended Claimant consult Dr. Charlton Barnes, an orthopedic surgeon, and advised Claimant not to return to work until he saw Dr. Barnes. (Tr. 66-67; CX-13, p. 4).

As a result, Claimant contacted Employer, specifically Mr. Billy Wilks, and requested to see Dr. Barnes. Claimant testified Mr. Wilks was unaware of his injury and wanted to talk to Employer's NASSCO on-site coordinator, Mr. Ladnier, to confirm whether or not an injury had occurred. Claimant waited two or three days before contacting Mr. Wilks again. Claimant stated when he spoke with Mr. Wilks he confirmed he had spoken to Mr. Ladnier who had informed him Claimant was "hurt on the job". (Tr. 68). Claimant further testified Mr. Wilks gave him two checks, one for $800.00 and the other in the amount of $500.00, for personal use. (Tr. 69). In addition, Claimant states Mr. Wilks vouched for Claimant's medical care with Dr. Barnes. Claimant understood Mr. Wilks to say he could repay the money whenever he got on workmen's compensation. (Tr. 70; CX-12, p. 9).

Claimant's first visit with Dr. Barnes was on April 1, 2002. Claimant testified he informed Dr. Barnes he injured himself in California when he picked up a piece of steel and threw it across his right shoulder.[6] Claimant stated Dr. Barnes wanted him to have a nerve test and an x-ray with dye

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[5] Apparently, Dr. Monk told Claimant he needed a nerve test because Claimant complained about leg numbness and weakness. Claimant related he had been experiencing the leg pain for about a month. In deposition, Dr. Monk testified, due to Claimant's leg complaints, he referred Claimant directly to a neurologist, Dr. Gratianne. (CX-21, pp. 15-16).

[6] On cross-examination, Claimant was questioned concerning Dr. Barnes's understanding that his date of injury was March 1, 2002 instead of March 4, 2002. On redirect, Claimant testified, although he signed Dr. Barnes's patient history form, an employee

of his right shoulder performed[7]. After these test were performed Claimant returned to Dr. Barnes on April 10, 2002. Claimant testified on this visit Dr. Barnes advised him not to return to work and recommended he undergo an MRI scan. (Tr. 70-71).

Claimant testified when he informed Mr. Wilks concerning his need for an MRI scan Mr. Wilks responded he was going to let the insurance company handle it because he could not afford to pay for an MRI scan and the reason he paid insurance was for situations like this. As a result, Claimant was contacted by Employer's insurance company and asked to give a statement. Claimant complied with this request and maintains his statement was the same statement he "gives to everyone." Furthermore, Claimant requested the insurance company to provide the medical treatment recommended by Dr. Barnes. However, Claimant was informed no medical treatment could presently be authorized because the insurance company was not in possession of any paperwork concerning Claimant's injury. (Tr. 71-72).

Claimant returned to see Dr. Barnes on July 5, 2002. On this visit Claimant was still experiencing pain in his neck and shoulders. Dr. Barnes would not allow Claimant to return to work and was still recommended an MRI scan. (Tr. 72).

Claimant testified since July 5, 2002, he has secured work with several employers. First, Claimant worked for CMI where he performed minor repairs on mobile homes. This work did not require any overhead activities or heavy lifting. Claimant earned $12.00 an hour and worked a 40-hour week. Claimant was employed by CMI for two weeks. (Tr. 73-74).

Next, Claimant worked for Mr. William Bennett remodeling government homes. This work necessitated the removal and replacement of heating units and hot water heaters. Claimant stated his helpers did all the heavy work while he did the layout of the floor systems. Claimant earned $15.00 an hour here and worked approximately 32 hours a week. Claimant was employed by Mr. Bennett for about 4 to 6 weeks. Claimant left Mr. Bennett's employment when he was asked to do overhead sheetrock work. (Tr. 74-76).

Thereafter, Claimant was employed by Mr. James Tyler remodeling an apartment. Mr. Tyler required Claimant to submit a bid for the job. Claimant's bid was $3,500.00. Claimant was paid $15.00 an hour. Claimant employed a helper, Mr. Bruce Perrin, to perform the heavy work. Claimant began the remodeling work toward the end of December 2002 and finished the project in

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of Dr. Barnes completed it. Claimant stated when questioned by the employee concerning the date of injury he replied March 4, 2002. (Tr. 93, 98; CX-12, pp. 1-2).

[7] An EMG-NCV evaluation and a right shoulder arthrogram were performed on Claimant on April 5, 2002 at Singing River Hospital in Pascagoula, Mississippi. (CX-12, pp. 4-5).

May 2003. Of the $3,500.00 bid, Claimant retained $2,700.00 with the other $800.00 going to his helper. (Tr. 76-78).

Claimant's brother died on May 14, 2003. Claimant testified he was not in a position to look for work until after his brother's death. He has applied for various positions with local casinos. For example, Claimant applied for a security guard position with Boomtown Casino, a valet parking attendant position with Casino Magic, and a shuttle driver position with the Isle of Capri Casino. (Tr. 79-80). On cross-examination, Claimant admitted he has not been denied work by any of these potential employers because of his injury. (Tr. 96).

Claimant's most promising potential employer is his previous employer Mr. Bennett. Claimant testified Mr. Bennett contacted him and request he work for him hanging masonite on buildings in the Naval yard. Claimant states Mr. Bennett is aware of Claimant's physical limitations and to that end Claimant will have three helpers working with him. Mr. Bennett anticipates completion of one house per week and has agreed to pay Claimant $400.00 per house. Claimant hopes to begin this work on May 20, 2003. (Tr. 80-81).

Claimant testified he still experiences pain and discomfort. In particular, Claimant has constant headaches and pain in his neck, shoulders, arms, hands, and chest. Claimant states he wants his neck and shoulder fixed. Claimant would like to continue treating with Dr. Barnes and followup on Dr. Barnes' diagnostic recommendations. (Tr. 81-82).

Billy Wilks

Mr. Billy Wilks described his position with Employer as a "retired consultant". Mr. Wilkes started J&M Associates about 22 years ago and retired about 2 years ago. Currently, J&M Associates is owned by his two sons. Mr. Wilks acts as a liaison between J&M Associates and NASSCO. (Tr. 105).

Mr. Wilks testified he was aware of Claimant's March 4, 2002 incident; however, it was reported to him as high blood pressure and chest pain. He stated it was not Employer's practice to file a report in a situation were an employee has a personal medical problem. Mr. Wilks first became aware of Claimant's alleged injury when he was contacted by Claimant shortly after Claimant returned from California. Claimant told Mr. Wilks how he injured himself by lifting a strong back. In addition, Claimant stated Employer's on-site coordinator, Mr. Ladnier, was aware of the work injury. Mr. Wilks was not in possession of an accident report and not in a position to dispute whether or not Claimant had a work injury; therefore, Mr. Wilks told Claimant he would need to check out Claimant's story with Mr. Ladnier. (Tr. 107-108).

Mr. Wilks testified that during this conversation Claimant requested financial assistance. He stated Claimant was in "dire straits financially" and about to lose his truck. Mr. Wilks agreed to make a loan to Claimant with the understanding Claimant would repay the loan whenever Claimant went

back to work.[8] Mr. Wilks also testified when Dr. Barnes's office called he agreed to pay for Claimant's initial visit with the understanding he would not be responsible for any further payments.[9] (Tr. 110-111).

Mr. Wilks reported he spoke with Mr. Ladnier somewhere around March 11, 2002. (Tr. 109, 126). Mr. Wilks testified Mr. Ladnier told him he did not file an accident report because Claimant's March 4, 2002 incident was due to high blood pressure and chest pain[10] and Claimant had asked Mr. Ladnier not to file a report as it would go against Claimant's work record.[11] (Tr. 108-109).

In contradiction, Mr. Wilks admitted he was in possession of an accident report, dated March 20, 2003, completed by Mr. Ladnier. [12] (Tr. 112). Interestingly, this report indicates that on March 4, 2002, Claimant was working aboard the Tote and his supervisor was Mr. Steve Carr. Furthermore, **the report states Claimant was injured while carrying a steel plate on his right shoulder**.

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[8] On cross-examination, Mr. Wilks admitted it was against Employer's policy to make pay advances; however, he pointed out this policy was meant to prohibit job site pay advances. (Tr. 124; CX-4, p. 9).

[9] Dr. Barnes's records indicate Employer issued a check on Claimant's behalf on March 28, 2002, in the amount of $213.00.

[10] Mr. Wilks testified Mr. Ladnier would have been instructed not to file an accident report if it only documented information relating to an employee's personal health problems such as high blood pressure and chest pains. (Tr. 109-110).

[11] Mr. Ladnier executed an affidavit on February 21, 2003, which indicates he was the on-site coordinator for Employer at NASSCO on March 4, 2002, and remained in that position until March 26, 2002 when he gave two weeks notice and was terminated. In the affidavit, Mr. Ladnier states on March 4, 2002, Claimant reported to him that "he [had] lifted a strong back at work and experienced chest, arm, and neck pain". However, Mr. Ladnier's affidavit does not corroborate Claimant's testimony that he reported his work injury to NASSCO's company doctor or the emergency room physician at Paradise Valley hospital. Furthermore, Mr. Ladnier maintains he completed an accident report concerning the incident and turned it in to Nicole, Employer's secretary in California. Mr. Ladnier stated when he was contacted by Mr. Wilks he advised Mr. Wilks that Claimant reported his March 4, 2002 work injury and he had completed and turned in an accident report.

[12] The parties stipulated that the report should have been dated March 20, 2002 (Tr. 17), and will be so treated.

(CX-3, p. 1). Mr. Wilks testified Mr. Ladnier was giving them problems and instead of following Employer's directions choose to resign. Mr. Wilks stated Mr. Ladnier turned in the accident report the day he resigned. (Tr. 113-114). On cross-examination, Mr. Wilks testified he was in receipt of the accident report somewhere around March 20, 2002, (Tr. 127-128), and notified Employer's insurance company shortly thereafter. (Tr. 134-135).

Mr. Wilks admitted despite his conversation with Mr. Ladnier around March 10 or 11, 2002, in which Mr. Ladnier denied Claimant suffered an injury, and despite receipt of the accident report March 20 or 21, 2002, wherein Mr. Ladnier detailed Claimant's work injury, Employer still issued a check to Dr. Barnes's office for Claimant's medical care on March 28, 2002. (Tr. 129-132). On redirect examination, Mr. Wilks explained the reason Employer issued the check on Claimant's behalf was because he had mentioned to Dr. Barnes's office there was a problem with documentation with the insurance company, which prompted Dr. Barnes's office to require payment up front, so he authorized this particular visit. (Tr. 142).

The Medical Evidence

Paradise Valley Hospital

The medical records from Paradise Valley Hospital[13] indicate Claimant has been a patient there on three occasions. Claimant's first visit to Paradise Valley was on November 23, 2001. On this visit, Claimant complained of chest pain and vomiting after eating Chinese food. (CX-7, pp. 48, 52). Claimant was seen in Paradise Valley's emergency room by Dr. Paul J. Manos, D.O. who diagnosed acute vomiting. Dr. Manos discharged Claimant and advised him to return if his pain worsened. (CX-7, pp. 53).

Claimant's second visit occurred on January 29, 2002.[14] On this visit Claimant presented to the emergency room complaining of a sudden episode of tightness in his chest. (CX-7, p. 22). Claimant was initially examined by Dr. David Becks, D.O. who diagnosed Claimant with chest pain and admitted him to rule out myocardial ischemia. (CX-7, pp. 22-25). Claimant was next seen by Dr. Albert J. Sharf, M.D., a cardiologist. (CX-7, pp. 26, 31). Dr. Sharf's impression of Claimant's condition was substernal chest tightness in the setting of high blood pressure, palpitations, hypertension out of control, and noncompliance with alcoholism. Dr. Sharf's treatment plan consisted of admitting Claimant to rule out myocardial infraction, continue with anti-anginals, titrate

[13] Paradise Valley Hospital is located in National City, California. (CX-7, p. 1).

[14] At the formal hearing, when questioned by the undersigned as to whether Claimant recalled going to Paradise Valley on January 29, 2002 for chest pain and high blood pressure, Claimant testified he did not "remember going in there for nothing other than just that food poisoning". (Tr. 101-102).

blood pressure medications, and obtain a stress test prior to discharge. (CX-7, pp. 26-28). Claimant was also seen by Dr. William D. O'Riordan, M.D., who diagnosed Claimant with acute chest pain, acute coronary syndrome, hypertension, and cardiomyopathy, type unknown. (CX-7, pp. 29-31). In connection with this visit, Claimant underwent a chest x-ray, ECG, and echocardiogram on January 29, 2002 and a myocardial stress test and second ECG on January 30, 2002. (CX-7, pp. 32-46).

Claimant's third visit to the emergency room was on March 4, 2002. Claimant complained of chest pain lasting about a minute after finding out his blood pressure was high that day. In addition, Claimant related he began experiencing left side tenderness radiating into his left shoulder upon arriving in the emergency department. Claimant rated his left side and shoulder pain as a 1 on a 10 point scale and described it as a small tinge. Claimant was examined by Dr. Manos. On physical examination, Dr. Manos noted Claimant was grossly intact neurologically, his neck was supple, and his back was without tenderness.[15] (CX-7, pp. 5-7). Dr. Manos ordered a chest x-ray, blood testing, and an ECG. (CX-7, pp. 8-14). Dr. Manos diagnosed Claimant with acute hypertension and chest pain. Claimant was released after his pain went away and advised to take his medications as prescribed and follow up with his family doctor. (CX-7, p. 6).

Paul J. Manos, D.O.

The parties deposed Dr. Manos on March 27, 2003. Dr. Manos is board-certified in emergency medicine and currently practices emergency medicine at Paradise Valley Hospital. Dr. Manos estimates he has practiced emergency medicine for approximately 9 years. (CX-8, pp. 6-8).

Dr. Manos testified he has examined Claimant on two occasions. The first occasion was on November 23, 2001 when Claimant presented complaining of vomiting after eating Chinese food. Dr. Manos diagnosed Claimant with vomiting, administered Phenagran, and released Claimant with instructions to return if his pain worsened. (CX-8, pp. 10-11).

Dr. Manos next encountered Claimant on March 4, 2002. On this visit Claimant gave a history of chest pain, which lasted for approximately a minute, after he thought or found out his blood pressure was high. Dr. Manos stated Claimant did not report a work injury. Dr. Manos testified Claimant underwent a head-to-toe examination which would have included Claimant's right shoulder and arm; however, Claimant did not complain of right shoulder or arm pain. Dr. Manos stated Claimant's pain went away after Claimant was given Ativan and a "banana bag"[16]. Dr. Manos opined

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[15] Furthermore, the registered nurse who performed Claimant's "Initial Assessment" noted Claimant was able to move all of his extremities. (CX-7, p. 3).

[16] Dr. Manos described a "banana bag" as one containing multivitamins and magnesium sulfate which is given to a patient who has a history of being a regular alcohol drinker. (CX-8, p. 14).

Claimant's chest pain was probably non-cardiac in nature and discharged Claimant. (CX-8, pp. 12-17).

On cross-examination, Dr. Manos admitted the history he takes when a person is having a cardiac problem is different from the history he takes when a person has been involved in a trauma. (CX-8, pp. 26-28). However, on redirect, Dr. Manos explained when a patient complains of chest pain the patient's shoulders are also examined. (CX-8, pp. 30-31).

William Monk, M.D.

The parties deposed Dr. Monk on May 13, 2003. Dr. Monk is a 1963 graduate of Southwestern Medical School which is located in Dallas, Texas. After graduation, Dr. Monk did a one year residence at the San Francisco Marine Hospital and then practiced with the U.S. Public Health Service in Gallup, New Mexico where he received credit for one year of family practice residence. Dr. Monk estimates he has been certified by the American Board of Family Practice for approximately thirty years. Dr. Monk has continuously practicing family medicine since 1967. (CX-21, pp. 7-10).

Dr. Monk testified he first saw Claimant on March 5, 2002. On this visit Claimant sought medication to control his blood pressure. Dr. Monk stated Claimant made no mention of the alleged work injury he suffered the previous day nor did he complain of shoulder pain or problems. However, Dr. Monk explained if Claimant would have complained of shoulder pain he may not have necessarily recorded it. (CX-9, p. 2; CX-21, pp. 10-12).

Claimant next consulted Dr. Monk on March 7, 2002. Claimant reported he was experiencing bilateral leg numbness and weakness after drinking three beers and laying in bed. Claimant confided he had been experiencing these symptoms for approximately one month. Dr. Monk testified Claimant again did not report a work injury nor complain of neck or shoulder problems. Based on Claimant's lower extremity complaints, Dr. Monk referred Claimant to Dr. Gratianne, a neurologist.[17] (CX-9, p. 2; CX-21, pp. 14-16).

Robert Donald, III, M.D.

Dr. Donald was deposed by the parties on March 25, 2003. Dr. Donald graduated from the University of Mississippi Medical School and did his residence in Pensacola, Florida. Dr. Donald served in the United States Navy for three years and upon returning did a family practice residence in Jackson, Mississippi. Dr. Donald is a member of the American Board of Family Practice. (CX-11, pp. 5-6).

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[17] Claimant did not consult Dr. Gratianne, but returned home to Mississippi where he visited his family physician, Dr. Robert Donald, M.D. (Tr. 65-66).

Dr. Donald testified that in the past he has treated Claimant for dizziness, fatty liver disease, hypertension, gout, and arthritis.[18] Dr. Donald explained most of Claimant's care was related to hypertension. (CX-11, pp. 8-10). On March 11, 2002, Claimant consulted Dr. Donald to have his blood pressure checked and complained of bilateral leg burning and fatigue. Dr. Donald testified Claimant made no mention of a work injury affecting his shoulder. Dr. Donald diagnosed hypertension - probably controlled, fatigue, gout, and hiatal hernia. In addition, Dr. Donald requested Claimant return later in the week for a re-evaluation.[19] (CX-10, p. 16; CX-11, pp. 15-18).

Claimant returned on March 12, 2002 and complained of right shoulder pain. Claimant informed Dr. Donald his right shoulder pain began gradually the day before. Claimant stated he tried to work his shoulder pain out by lifting his arm above his head and performing round motions with his shoulder. Claimant related he had injured his shoulder previously and was able to "work it out" with these exercises; however, this time the exercises only made it worse. Dr. Donald diagnosed a right shoulder strain - possible rotator cuff tear and hypertension. (CX-10, p. 15).

Dr. Donald testified, unless the previous injury Claimant alluded to was his alleged work injury of March 4, 2002, he did not at that time correlate Claimant's shoulder complaints to a work injury. Claimant did not report any injury to his shoulder. Furthermore, Dr. Donald testified it was his impression Claimant's previous shoulder injury had resolved. (CX-10, p. 15; CX-11, pp. 19-22). Dr. Donald opined if the previous shoulder injury to which Claimant made reference was in fact Claimant's alleged March 4, 2002 work injury, Claimant's injury would not have completely resolved and Claimant "would have [had] some sort of residual inflammation under the best of circumstances". (CX-11, pp. 32-33).

Claimant's next visit with Dr. Donald was on March 21, 2002. On this visit Claimant complained of right shoulder, knee and wrist pain; however, Claimant stated he sustained his shoulder injury at work a little more than a week ago.[20] Dr. Donald conceded Claimant's story on this visit was different from his account on March 12, 2002. Dr. Donald's assessment was right shoulder pain, right wrist pain, and right knee swelling. (CX-10, p. 10; CX-11, pp. 26-28). Dr. Donald admitted because of Claimant's inconsistent histories he could not "say one way or the other whether"

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[18] Interestingly, Dr. Donald's testified Claimant called him from California on January 31, 2002 and related he had been hospitalized for chest pain and was upset about his care at the emergency room. (CX-11, pp. 10-11). See supra n. 13.

[19] Dr. Donald's records indicate on March 11, 2002 Claimant stated he was going to return to work as soon as he got well. (CX-10, p. 16).

[20] On May 1, 2002, Dr. Donald's office, at Claimant's request, generated a letter addressed "To Whom It May Concern" indicating Claimant was seen by on March 12 and 21, 2002 for a work-related injury which occurred on or about March 11, 2002. (CX-10, p. 5; CX-11, pp. 28-30, 41-42).

Claimant's shoulder complaints were related to Claimant's alleged March 4, 2002 work injury in California. (CX-11, pp. 33-34).

Dr. Donald testified because of Claimant's shoulder pain he referred Claimant to an orthopedic surgeon, Dr. Wiggins. However, Dr. Wiggins' office refused to see Claimant because Claimant had an outstanding bill, over $400.00. As a result, Dr. Donald made another referral this time to Dr. Barnes. (CX-10, p. 10; CX-11, p. 35).

Claimant's next visit with Dr. Donald occurred on July 9, 2002. During this visit Claimant requested to have his blood pressure checked and complained of heartburn and anger. Dr. Donald also noted Claimant had had trouble with his shoulder recently. Dr. Donald diagnosed hypertension - question of control, GERD, and mood disturbance. (CX-10, p. 2).

In connection with this visit Dr. Donald wrote a letter, apparently to Employer's workers' compensation carrier, stating Claimant was initially seen on March 11, 2002 and complained of a "burning and a fire-like feeling in his legs". In this letter, Dr. Donald opined Claimant's leg symptoms were caused from some neck dysfunction Claimant reported he got while working in California. (CX-10, p. 3). In deposition, Dr. Donald testified during his July 9, 2002 visit Claimant stated his leg symptoms were related or were part of his alleged California work injury.[21] (CX-11, pp. 56-57).

Charlton Barnes, M.D.

The parties deposed Dr. Barnes on March 31, 2003. Claimant first visit with Dr. Barnes, an orthopedic surgeon[22], was on April 1, 2002. Dr. Barnes' patient history form indicates Claimant injured his right shoulder on March 1, 2002 when he threw steel across it.[23] (CX-12, p. 1). Dr. Barnes testified Claimant reported since the date of his alleged work injury he was having difficulty raising his right arm. Dr. Barnes assessed Claimant as suffering from either a rotator cuff tear or impingement syndrome. Dr. Barnes also recommended Claimant consult Dr. Millette, a neurologist, and undergo diagnostic testing to include an arthrogram and EMG/NCV. (CX-12, p. 3; CX-13, pp. 5-7).

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[21] Claimant's July 9, 2002 statement to Dr. Donald concerning the relatedness of his lower extremity symptoms to his alleged California work injury is in contradiction to his statement to Dr. Monk. Specifically, on March 7, 2002, Claimant reported to Dr. Monk he had been experiencing bilateral leg numbness and weakness for a month. (CX-9, p. 2; CX-21, p. 15).

[22] Claimant's and Employer's counsel stipulated to Dr. Barnes' qualifications as an expert in the field of orthopedic surgery. (CX-13, p. 4).

[23] See supra, n. 7.

Claimant underwent these diagnostic studies on April 5, 2002 at Singing River Hospital in Pascagoula, Mississippi. Claimant's right shoulder arthrogram was interpreted by Dr. Ronald Mestayer, M.D., a radiologist. Dr. Mestayer interpreted Claimant's arthrogram as normal. Dr. Terry Millette, M.D. interpreted Claimant's EMG-NCV results. Dr. Millette reported Claimant's NCV findings as normal; however, Dr. Millette was unable to be as definitive when interpreting Claimant's EMG findings. Specifically, Dr. Millette's report indicates Claimant's refusal to undergo EMG testing of his cervical paraspinal muscles made differentiation of Claimant's EMG changes difficult. In light of this, Dr. Millette felt a neurapraxia of the right suprascapular nerve or a right C5/C6 radiculopathy were clinical considerations. (CX-12, pp. 4-5).

Claimant's next visit with Dr. Barnes was on April 10, 2002. On this visit Claimant was "still unable to raise his right shoulder all the way" and his right acromioclavicular joint was tender. Dr. Barnes noted Claimant's arthrogram was negative,[24] but felt his EMG/NCV study showed some sort of nerve dysfunction. Dr. Barnes diagnosed a sprained right acromiclavicular joint and nerve root impingement. In addition, Dr. Barnes recommended Claimant undergo a cervical MRI scan. (CX-12, p. 6).

Claimant last saw Dr. Barnes on June 5, 2002. Claimant complained of neck pain radiating to his shoulder. In addition, Claimant's right acromioclavicular joint was tender. During this visit, Dr. Barnes obtained x-rays of Claimant's cervical spine. Dr. Barnes diagnosed arthritis of the right acromioclavicular joint and again recommended a cervical MRI scan to rule out cervical problems. (CX-12, p. 8).

Dr. Barnes explained that it is his opinion Claimant is probably suffering from either a right shoulder brachial plexus injury or a torn trapezius muscle. (CX-13, pp. 13-14).

On cross-examination, Dr. Barnes agreed the complaints for which he is treating Claimant in all reasonable medical probability where related to Claimant's March 4, 2002 alleged work injury. (CX-13, p. 20). Nevertheless, when informed Claimant did not complain of shoulder pain when he was examined by a physician on Claimant's alleged date of injury, Dr. Barnes admitted this would cause him to doubt whether Claimant's injury was sustained on that date. (CX-13, pp. 15-16, 25-26).

The Contentions of the Parties

Claimant contends he sustained a work injury on March 4, 2002, in California when he threw a strong back across his right shoulder. Claimant asserts he immediately began to experience pain in his shoulders, arms and chest. Claimant contends he did not report his injury to his supervisor at NASSCO because the supervisor did not ask about an accident. Claimant asserts he did tell

[24] In deposition, Dr. Barnes explained a normal arthrogram indicates a patient does not have a rotator cuff tear. (CX-13, p. 9).

Employer's NASSCO on-site coordinator, Bobby Ladnier, about his work injury. Claimant maintains he informed NASSCO's on-site physician he had a piece of steel on his shoulder when his pain began; however, NASSCO's physician was under the impression Claimant was having a heart attack. Claimant insists he informed the emergency room physician at Paradise Valley Hospital that he had thrown a piece of steel on his shoulder, but the emergency room physician deferred to the NASSCO's company doctor who reported Claimant was having a heart attack.

Employer/Carrier, on the other hand, assert Claimant's injury did not occur as Claimant alleges. Employer contends Claimant's shoulder pain was not work-related and began in Mississippi on March 11, 2002.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends on March 4, 2002 his NASSCO supervisor, Mr. Carr directed him to "fit off" the bulkhead on the Tote. Claimant testified he was working alone about midship on the third deck of the Tote when he threw a strong back over his right shoulder and made a turn towards the bulkhead. Claimant immediately felt pain in his shoulder. Although, Claimant acknowledges he failed to relate the mechanism of his injury to his supervisor, Mr. Carr, Claimant maintains he did advise Employer's on-site coordinator, Mr. Ladnier, of his mechanism of injury.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Assuming arguendo that Claimant's testimony is credible, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on March 4, 2002, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

In the present case, Employer presented Claimant's medical records from Paradise Valley Hospital and the testimony of Dr. Manos. On March 4, 2002, Claimant presented at Paradise Valley Hospital with complaints of chest pain. Claimant also related he began experiencing left side and shoulder pain upon arriving in the emergency department. Dr. Manos was the emergency room physician who examined Claimant that day. Dr. Manos testified he performed a head-to-toe examination of Claimant which would have included Claimant's right shoulder; however, Claimant did not complain of right shoulder or arm pain. Accordingly, Employer has presented substantial evidence to rebut the Section 20(a) presumption.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must **weigh all of the evidence and resolve the causation issue based on the record as a whole with the Claimant bearing the burden of persuasion**. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

3. Weighing All Record Evidence

The central issue in this case is whether Claimant sustained a work injury in California on March 4, 2002, or whether Claimant's right shoulder complaints are the result of some other mechanism which prompted Claimant to seek medical care on March 11, 2002 in Mississippi. In light of the conflicting medical and testimonial evidence, I find Claimant has not met his burden under Greenwich Collieries in establishing, by a preponderance of the evidence, that he suffered a harm at work which caused his shoulder complaints/injury.

Claimant alleges he sustained a work injury on March 4, 2002. He testified he was "fitting off" the bulkhead on the Tote when he threw a strong back across his right shoulder and turned toward the bulkhead. Claimant states it was as if his shoulder caught fire. Thereafter, Claimant reported to

his NASSCO supervisor, Mr. Carr, that he was hurting "real bad" in his neck, shoulders, arms, and across his chest. Claimant did not tell Mr. Carr how he injured himself because Mr. Carr did not ask. I find Claimant's omission of failing to inform Mr. Carr that he had sustained a work trauma, consistent with his subsequent failures to report the accident, are detrimental to his claim.

Mr. Carr summoned NASSCO's ambulance which transported Claimant to NASSCO's on-site medical facility. Claimant encountered Employer's on-site coordinator, Mr. Ladnier, at the facility. Claimant contends he described his mechanism of injury to the company doctor in the presence of Mr. Ladnier. Claimant claims the company doctor was concerned he was having a heart attack and advised Mr. Ladnier to transport Claimant to Paradise Valley Hospital. Although Claimant was aware of his traumatic injury, Claimant testified it was at this point he became concerned he was having a heart attack because the company doctor made him think he was having a heart attack.

Claimant testified, upon arrival at the hospital, he informed the emergency room physician, Dr. Manos, that he had thrown a piece of steel on his shoulder.[25] Claimant states this made no impression on Dr. Manos because the company doctor reported he was having a heart attack. In contradiction to Claimant's account, Dr. Manos testified Claimant presented to the emergency room with complaints of chest pain. Dr. Manos reported Claimant did not report a work injury. Dr. Manos testified he performed a head-to-toe examination which included Claimant's right shoulder and arm

[25] Tangentially, Claimant's testimony concerning his previous visits to Paradise Valley Hospital bears on Claimant's credibility. Specifically, prior to Claimant's visit on March 4, 2002, he presented to the hospital on two other occasions. Claimant's first visit was on November 23, 2001, when he complained of vomiting after eating Chinese food. Claimant was diagnosed with acute vomiting, given Phenagran, and released. His next visit was on January 29, 2002, when he complained of a sudden episode of tightness in his chest. On this visit Claimant was admitted, examined by three physicians, underwent a chest x-ray, ECG, and echocardiogram on January 29, 2002, and on January 30, 2002, underwent a myocardial stress test and second ECG. Claimant was diagnosed with acute coronary syndrome, hypertension, and cardiomyopathy - type unknown. Moreover, on January 31, 2002, Claimant telephoned Dr. Donald, his family physician in Mississippi, and advised Dr. Donald that he had been hospitalized in California for chest pain. Claimant also expressed to Dr. Donald his displeasure with the care he received at the hospital. Despite all this, at the formal hearing when questioned by the undersigned concerning his January 29, 2002 visit to Paradise Valley Hospital, Claimant testified he did not "remember going [to Paradise Valley Hospital] for nothing other than just that food poisoning". Accordingly, I find Claimant's testimony evasive, irreconcilable, and unconvincing.

and Claimant did not complain of right shoulder or arm pain nor were any objective signs of injury found. Claimant's pain went away after he was given a "banana bag" and Ativan.

On cross-examination, Dr. Manos admitted the history he takes when he suspects a cardiac problem is different from the history he takes when a patient suffers a trauma. On redirect examination, however, Dr. Manos explained when a patient complains of chest pain the patient's shoulders are also examined. Consequently, I find Claimant's version of the events taking place at Paradise Valley Hospital on March 4, 2002 doubtful and belied by Dr. Manos's testimony.

Claimant testified he needed a release to return to work. At the direction of NASSCO's company doctor, he consulted Dr. Monk on March 5, 2002. Claimant related he "did not want to be hurt" and visited Dr. Monk mainly for his blood pressure and the release. Dr. Monk testified Claimant did not report a work injury nor complain of shoulder pain or problems. Dr. Monk stated, even if Claimant would have made complaints of shoulder pain, he may not necessarily have recorded it.

Claimant returned to Dr. Monk on March 7, 2002. On this occasion, Claimant complained of bilateral leg numbness and weakness. Claimant stated these symptoms began after he consumed three beers and reclined in bed. Claimant confided he had been experiencing these symptoms for about a month. Claimant did not report a work injury or shoulder pain or problems. However, Claimant inconsistently informed Dr. Donald, as noted below, that his leg symptoms were related to or part of his work injury. As a result, I find Claimant's credibility again seriously undermined by Dr. Monk's reports and testimony.

Furthermore, assuming arguendo Claimant's rationale for his March 5, 2002 visit with Dr. Monk is credible and Claimant's work injury of March 4, 2002 actually occurred, it is difficult to understand why, on March 7, 2002, when Claimant's visit was not dominated by cardiac concerns, Claimant would not, in addition to advising Dr. Monk of his lower extremity complaints, inform Dr. Monk of his work injury or shoulder complaints. Therefore, I find Claimant's failure to report unreasonable and puzzling.

Unable to secure a work release, Claimant returned to Mississippi on March 10, 2002. The next day, March 11, 2002, Claimant consulted Dr. Donald. Claimant testified he told Dr. Donald he was having problems with his blood pressure and was hurting in his neck, shoulder, arm, chest, and leg. Moreover, Claimant asserts he told Dr. Donald the reason his shoulder was hurting was because he had thrown a piece of steel onto the shoulder.

Dr. Donald's records and testimony detail a different chain of events. Dr. Donald testified Claimant presented on March 11, 2002, requesting his blood pressure be checked and complaining of fatigue and bilateral leg burning. Dr. Donald stated Claimant did not mention a work injury affecting his shoulder. Dr. Donald diagnosed hypertension, fatigue, gout, and hiatal hernia and requested Claimant return later in the week for a re-evaluation. Accordingly, I find Claimant's testimony concerning his March 11, 2002 visit with Dr. Donald patently incredible.

Claimant returned on, March 12, 2002, and this time complained of right shoulder pain. Claimant told Dr. Donald his shoulder pain **began gradually the day before**. Claimant related he tried to work the pain out by lifting his arm above his head and performing round motions with his shoulders. Claimant reported he had previously injured his shoulder and was able to work it out with these motions, but this time the motions only made it worse. Dr. Donald diagnosed right shoulder strain - possible rotator cuff tear and hypertension.

Dr. Donald testified Claimant again made no mention of a work injury and it was his impression the previous shoulder injury to which Claimant referred had resolved. Dr. Donald opined if the previous shoulder injury Claimant referenced was his alleged work injury of March 4, 2002, Claimant's injury would not have completely resolved and under the best of circumstances Claimant would have had some sort of residual inflammation, which contradicts Claimant's reported history.

Dr. Donald's opinion is persuasive. Claimant's alleged work injury occurred on March 4, 2002. A mere eight days later Claimant gave a history of a gradual onset of shoulder pain beginning the day before and a similar previously resolved shoulder condition. Dr. Donald concluded, due to the nature of the inflammatory process, if Claimant's previous injury was his alleged work injury of March 4, 2002, his shoulder condition would not have been completely resolved. In light of the foregoing, I find Dr. Donald's opinion well-reasoned. Therefore, in view of the litany of contradictions and inconsistencies discussed above, I find Claimant's shoulder condition did not occur in California on March 4, 2002, as claimed.

Claimant's next visit with Dr. Donald was on March 21, 2002. During this visit Claimant complained of right shoulder, knee, and wrist pain and for the first time related his shoulder complaints to a work injury he suffered **a little more than a week ago**. Dr. Donald diagnosed right shoulder pain, right wrist pain, and right knee swelling and recommended Claimant consult an orthopedic surgeon. Dr. Donald testified Claimant's history on this visit was different from his history on March 12, 2002 and because of this he could not state one way or the other whether Claimant's right shoulder complaints were related to Claimant's alleged March 4, 2002 work injury.[26]

Claimant was also seen by Dr. Donald on July 9, 2002. On this visit, Claimant requested his blood pressure be checked and complained of heartburn and anger. Dr. Donald also noted Claimant had had trouble with his shoulder recently. Dr. Donald's assessment of Claimant on this visit was hypertension, GERD, and mood disturbance. Dr. Donald testified that Claimant also stated his lower

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[26] It is interesting to note, if Claimant's representations to Dr. Donald are taken at face value, Claimant, at best, apparently places his date of injury somewhere around March 14, 2002, which does not coincide with an alleged date of injury of March 4, 2002.

extremity symptoms were related or were part of his alleged California work injury. As a result, Dr. Donald composed a letter, apparently to Employer's workers' compensation carrier, wherein he opined Claimant's leg symptoms were caused from some neck dysfunction Claimant reportedly sustained while working in California. As discussed below, Claimant's credibility is again inconsistent and unpersuasive because he originally related to Dr. Monk that his lower extremity problems began approximately one month prior to his alleged work injury.

Claimant testified he consulted an orthopedic surgeon, Dr. Barnes on April 1, 2002. Claimant informed Dr. Barnes he injured himself in California when he picked up a piece of steel and threw it across his right shoulder. Claimant stated Dr. Barnes recommended Claimant have a nerve test and an x-ray with dye of his right shoulder performed. Claimant underwent these diagnostic procedures and returned to Dr. Barnes on April 10, 2002. Claimant testified on this visit Dr. Barnes advised him not to return to work and recommended he undergo a cervical MRI scan.

Dr. Barnes's medical records and testimony is obviously more detailed and technical, but sufficiently similar to Claimant's testimony. Dr. Barnes's records indicate Claimant reported he injured his right shoulder on March 1, 2002[27] in California when he threw steel across it. In addition, Claimant related since the date of his alleged injury he has had difficulty raising his right arm. Dr. Barnes made a differential diagnosis of rotator cuff tear or impingement syndrome. Dr. Barnes also recommended Claimant consult a neurologist and undergo diagnostic testing to include an arthrogram and EMG/NCV.

Claimant underwent these diagnostic tests on April 5, 2002. Claimant's arthrogram and NCV findings was normal; however, the clinical considerations given to Claimant's incomplete EMG study were neurapraxia of the right suprascapular nerve versus a right C5/C6 radiculopathy.

On April 10, 2002, Claimant reported to Dr. Barnes that he was still unable to raise his right arm all the way. Dr. Barnes observed his right acromioclavicular joint was tender. Based on Claimant's examination and diagnostic studies, Dr. Barnes diagnosed a sprained right acromioclavicular joint and nerve root impingement. Dr. Barnes again recommended Claimant undergo a cervical MRI scan.

Dr. Barnes explained Claimant is probably suffering from either a right shoulder brachial plexus injury or a torn trapezius muscle. He testified the complaints for which he is treating Claimant in all reasonable medical probability are related to Claimant's March 4, 2002 work injury. However, when informed Claimant did not complain of shoulder pain when he was examined by a physician on Claimant's alleged date of injury, Dr. Barnes admitted this would cause him to doubt whether Claimant's injury was sustained on that date.[28] Dr. Barnes's impression is well-reasoned and

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[27] See supra, n. 6.

[28] As noted above, Dr. Manos testified he performed a head-to-toe examination of Claimant on March 4, 2002. Dr. Manos's

compelling. Accordingly, Claimant's contention that he sustained a work injury on March 4, 2002 is again belied by cogent medical opinion.

In support of his contentions, Claimant asserts he reported his work injury to Mr. Ladnier on March 4, 2002. In addition, when he returned to Mississippi, Claimant contacted Mr. Wilks and requested authorization to see Dr. Barnes for his work injury to his shoulder. Mr. Wilks was unaware of Claimant's work injury and wanted to talk to Mr. Ladnier to confirm whether or not a work injury had occurred. According to Claimant, upon speaking with Mr. Ladnier, Mr. Wilks confirmed that Claimant was hurt on the job.

Mr. Ladnier completed an accident report on March 20, 2002. This report indicates Claimant was injured on March 4, 2002, while carrying a steel plate on his right shoulder. Furthermore, Mr. Ladnier executed an affidavit on February 21, 2003 in which he stated that on March 4, 2002, Claimant reported he lifted a strong back at work and experienced chest, arm, and neck pain. Mr. Ladnier maintains he completed and turned in an accident report to Employer. Mr. Ladnier's affidavit does not corroborate Claimant's testimony that he reported his work injury to NASSCO's company doctor or the emergency room physician at Paradise Valley Hospital.

On the other hand, Mr. Wilks testified Claimant's March 4, 2002 incident was originally reported to him as high blood pressure and chest pain. He stated it was not Employer's practice to file an accident report in a situation where an employee has a personal medical problem. Mr. Wilks stated he first became aware that Claimant was alleging a work injury shortly after Claimant returned to Mississippi. Mr. Wilks testified since he was not in possession of an accident report he was not in a position to dispute Claimant's alleged work injury. He told Claimant he would check out his story with Mr. Ladnier. Mr. Wilks testified when he spoke with Mr. Ladnier he was informed that no accident report was filed because Claimant's March 4, 2002 incident was due to high blood pressure and chest pain and Claimant had asked Mr. Ladnier not to file a report as it would go against his work record. In spite of this, Mr. Wilks admits he was in possession of a March 20, 2002 accident report completed by Mr. Ladnier. Mr. Wilks testified Mr. Ladnier was giving them problems and instead of following Employer's directions chose to resign on or about March 20, 2002.

The March 20, 2002 accident report and Mr. Ladnier's affidavit are evidence tending to support Claimant's position. Employer's attempt to undermine their effect by coloring Mr. Ladnier as a vindictive disgruntled employee is underdeveloped in the record. Consequently, the accident report and Mr. Ladnier's affidavit will be given appropriate, but diminished weight given its hearsay nature.

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examination would have included Claimant's shoulders. Dr. Manos stated Claimant did not report a work injury nor did Claimant complain of shoulder pain.

4. Conclusion

I find Claimant's testimony unconvincing and his post-March 4, 2002 actions unreasonable. Consequently, Claimant's testimony lacks credulity. Furthermore, I find the opinions of Drs. Donald and Barnes, indicating Claimant's injury resulted sometime after Claimant returned to Mississippi, mutually consistent and well-reasoned. As a result, when Claimant's unpersuasive credibility and his physician's negative medical testimony is weighed against the March 20, 2002 accident report and Mr. Ladnier's affidavit, Claimant is unable to meet his burden of persuasion.

In light of the foregoing, I find Claimant, as the proponent of his claim and position, failed to carry his burden of production and persuasion in establishing the existence of a compensable injury and the record is, at best, evenly balanced. See Director, OWCP v. Greenwich Collieries, supra. Therefore, his claim is hereby **DENIED**.

In view of this conclusion, the remaining issues presented for resolution are rendered of no legal significance and are considered moot.

V. ATTORNEY'S FEES

For a fee to be awarded pursuant to Section 28(a), the Claimant's attorney must engage in a "successful prosecution" of the claim. 33 U.S.C. § 928 (a); 20 C.F.R. § 702.134(a); Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982); Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980); American Stevedores, Inc. V. Salzano, 538 F.2d 933 (2d Cir. 1976); Rogers v. Ingalls Shipbuilding, Inc., 28 BRBS 89 (1993); Harms v. Stevedoring Servs. Of America, 25 BRBS 375 (1992); Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992). No award of attorney's fees for services to Claimant is made herein because Claimant's attorney did not engage in a successful prosecution of this claim. See Karacostas v. Port Stevedoring Co., 1 BRBS 128 (1974)(judge denied claim for compensation); Director, OWCP v. Hemingway Transp., Inc., 1 BRBS 73 (1974).

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Claimant's claim is hereby **DENIED**.

ORDERED this 2nd day of September, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge